

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOE E. BROWN

Claimant

VS.

BOEING MILITARY AIRPLANE COMPANY

Respondent

AND

AETNA CASUALTY & SURETY COMPANY

Insurance Carrier

AND

WORKERS COMPENSATION FUND

Docket No. 173,507

ORDER

Claimant requests review of the Award entered by Administrative Law Judge John D. Clark on August 31, 1995. The Appeals Board heard oral arguments on February 14, 1996, in Wichita, Kansas.

APPEARANCES

Claimant appeared by his attorney, Tamara J. Pistotnik of Wichita, Kansas. The respondent and its insurance carrier appeared by their attorney, Frederick L. Haag of Wichita, Kansas. The Workers Compensation Fund appeared by its attorney, Marvin R. Appling of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the stipulations of the parties are listed in the Award.

ISSUES

Pursuant to the scheduled injury statute, K.S.A. 1992 Supp. 44-510d, the Administrative Law Judge awarded claimant permanent partial disability benefits based upon a two percent functional impairment to the right leg. Claimant requested this review and contends he has sustained an injury to the right hip and low back and, therefore, is entitled to permanent partial general disability benefits under the provisions of K.S.A. 1992 Supp. 44-510e. On the other hand, respondent contends the Award should be affirmed.

Therefore, the sole question before the Appeals Board on this review is whether claimant is entitled to receive benefits for a "scheduled" injury under K.S.A. 1992 Supp. 44-510d or for an "unscheduled" injury under K.S.A. 1992 Supp. 44-510e.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Administrative Law Judge should be modified.

On August 11, 1992, claimant struck his right hip on the corner of a work bench while he was lifting a heavy pan of parts. Claimant contends he injured his hip and low back as a result of the incident. Respondent contends he injured his right leg only.

Claimant first sought treatment from the company's medical department which referred him to Paul D. Lesko, M.D., a Wichita orthopedic surgeon. Dr. Lesko saw claimant on seven occasions between August 21 and December 3, 1992. The doctor found tenderness over the greater trochanteric region, pain radiating down the leg consistent with iliac tibial band tendinitis, and trochanteric bursitis. His final diagnosis was trochanteric bursitis that constitutes a one to two percent functional impairment to the hip. Although EMG and nerve conduction studies indicated bilateral radiculopathy, because claimant did not complain of left leg symptoms and because claimant did not have any back pain when the doctor saw him, Dr. Lesko testified he does not believe the August 1992 incident aggravated an earlier spinal fusion. The doctor testified the claimant's symptoms were related to the trochanteric bursa and hip. He also testified the AMA Guides do not specifically address the hips and, therefore, believes the appropriate rating for this injury is to the lower extremity.

Medical records attached to Dr. Lesko's deposition indicate claimant had EMG and nerve conduction tests suggestive of bilateral L5 radiculopathy of a moderate degree. In a letter dated May 2, 1994, Dr. Lesko wrote that claimant had a one to two percent impairment to the hip and that claimant's back symptoms and sciatic-like symptoms were secondary to claimant's previous back surgery and not from the current injury. Counsel did not ask the doctor whether this letter contradicted his testimony regarding the existence of back pain.

Stephen Ozanne, M.D., a board-certified orthopedic surgeon, testified he saw claimant in January 1993 at the respondent's insurer's request. At that time claimant complained of pain in the right hip and flank area and was having difficulty walking. Dr. Ozanne examined claimant and tentatively diagnosed claimant's leg pain to be the result of either lumbar radiculopathy or some nerve involvement in the lower back. He questioned the status of the spinal fusion that was performed in the early 1960s and thought claimant might possibly have a nonunion. Although he recommended further testing including an MRI and tomography, he did not see the claimant again. He disagrees with Dr. Lesko's diagnosis of trochanteric bursitis.

In his deposition on page 13, Dr. Ozanne discussed the trochanter and stated:

"The trochanter is the outside of the hip, the bony bump that you can feel if you push in along the side of your leg, and that represents the upper part of the thighbone where it turns and becomes the hip. It's an area where muscles from the buttock area come down and attach to the thighbone, as well as some of the muscles in the thigh itself attach in that area or they go across that area.

"Now, the muscles that go across that area are protected somewhat by a thin lining of tissue between the muscles and the bone called a bursa, and we have bursa in our shoulders, in any moving joints, elbows, et cetera. Basically what the body does is create an area of lubrication so the muscles can smoothly glide over the bone. Sometimes with trauma or stress to an area and sometimes just as a course of what probably is some kind of arthritis condition, this bursa can become inflamed, and then it fills up with more of an irritating fluid or reaction. Now, that can make that area sore and tender to the touch. And, of course, when you move the muscles across the bone, that hurts. That's sort of a typical picture of trochanteric bursitis. A lot of times I think we use that term to describe pain in that area of the hip for which we have no other explanation. In fact, I think sometimes pain that is referred from the back or from deeper in the buttock area due to muscle problems can be presumed to be a bursitis. So it's sometimes a diagnosis that you give when you have no other explanation for the pain."

Rather than a leg injury, Dr. Ozanne believes claimant sustained an injury to his trunk and back and, therefore, the injury is more readily classified under the spine.

Claimant also saw Dr. McQueen in 1993 who also felt claimant had radicular symptoms suggestive of lumbar nerve entrapment. He also recommended additional evaluation of the low back and indicated claimant had no findings specifically consistent with trochanteric bursitis.

At his attorney's request, claimant was evaluated by Daniel Zimmerman, M.D., in May 1994. X-rays were taken at the doctor's direction that indicated minor arthritic changes in the right hip. He believes claimant sustained a 44 percent functional impairment to the right lower extremity at the hip level, or 18 percent to the whole body, and should permanently be restricted from activities where he would frequently flex his right hip and, therefore, should avoid frequent bending, stooping, squatting and crawling maneuvers. However, he does believe claimant can occasionally lift up to 20 pounds, and frequently lift up to 10 pounds. He believes claimant did not injure his back in the August 1992 incident because a back injury would neither explain the substantial restriction of range of motion at the right hip nor the severity of pain and discomfort noted in palpation around the greater trochanteric bursa. Instead, he believes claimant has aggravated osteoarthritis in the right hip and has developed chronic trochanteric bursitis.

When asked if the trochanteric bursa was part of the femur, on page 11 of his deposition Dr. Zimmerman said:

"It's one of the components about the hip joint to increase the mobility and fluidity by which one can move one's joint."

When asked if claimant had sustained an injury to the hip, at page 17 of his deposition the doctor stated:

"Q. And would that be an aggravation to the hip area?"

"A. Yes."

"Q. Where on the chart would you place that?"

"A. Well, actually, these two figures that the opposing attorney has submitted as deposition exhibits are anatomically absolutely correct."

"Q. Okay."

"A. And it's just where the hip socket interacts with the pelvic structures. The hip socket interacts, and then below that is the greater trochanter, and over the greater trochanter is a bursa which is called the greater trochanteric bursa. These drawings are absolutely anatomically excellent to illustrate the issue in this case.

"Q. Okay. And you do believe he aggravated his hip joint in this accident?

"A. Aggravated osteoarthritic change and trochanteric bursitis of a chronic nature."

Based upon the entire record, the Appeals Board finds it is more probably true than not true that claimant either injured his hip or the structures of the hip as a result of the August 1992 work-related accident. The record is uncontroverted that claimant has a significant restriction of range of motion in the hip. Uncontroverted evidence which is not improbable or unreasonable may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). Therefore, the claimant has established the hip is the situs of the resulting disability and, therefore, he should receive permanent partial general disability benefits under the provisions of K.S.A. 1992 Supp. 44-510e. See Bryant v. Excel Corp., 239 Kan. 688, 722 P.2d 579 (1986).

Because the Administrative Law Judge did not decide the issue whether claimant should receive permanent partial disability benefits based upon his functional impairment rating or a work disability as defined by K.S.A. 1992 Supp. 44-510e, the proceeding should be remanded for that determination and for the Judge to address any other issue properly before him and necessary to the disposition of this claim.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark on August 31, 1995, should be, and hereby is, modified; that this case should be, and hereby is, remanded to the Administrative Law Judge to determine the permanent partial disability benefits that claimant is entitled to receive under K.S.A. 1992 Supp. 44-510e and to address any other issues properly before the agency and necessary to the disposition of this claim. The Appeals Board does not retain jurisdiction over this proceeding.

IT IS SO ORDERED.

Dated this ____ day of March 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Tamara J. Pistotnik, Wichita, Kansas
Frederick L. Haag, Wichita, Kansas

JOE E. BROWN

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Marvin R. Appling, Wichita, Kansas
John D. Clark, Administrative Law Judge
Philip S. Harness, Director